



1 offense, within 1000 feet of a park, and one count of trafficking in a schedule I controlled substance.  
2 In November 2011, the State filed a second-amended information charging West with one  
3 count of sale of a controlled substance, third offense. On November 15, 2011, West presented  
4 argument in support of motions filed in Case No. CR 6429, including a motion to dismiss in which  
5 he argued the State violated double jeopardy by charging West with the same crime in Case No. CR  
6 6429 and the present case, Case No. CR 6693.

7 The court denied West's motion. West then changed his plea in Case No. CR 6693, entering  
8 a conditional guilty plea to the single count contained in the second-amended information, but  
9 reserving the right to challenge the denial of his pretrial motion to dismiss. The court sentenced  
10 West to 72-180 months, to run concurrent to the sentence received in Case No. CR 6429.

11 The court filed the judgment of conviction on November 29, 2011. West appealed., arguing  
12 that the "[p]rosecution of the instant case contravened the Double Jeopardy Clause and the related  
13 piecemeal doctrine; thus, the district court erred by denying the motion to dismiss." On December  
14 13, 2012, the Nevada Supreme Court affirmed West's conviction.

15 In December 2013, West filed a proper person state habeas petition and supporting  
16 memorandum. In Ground 1, he alleged vindictive prosecution, a violation of his speedy trial rights,  
17 and ineffective assistance of trial and appellate counsel. In Ground 2, he alleged insufficient  
18 evidence to support the conviction, a break in the chain of custody, and ineffective assistance of  
19 appellate counsel. In Ground 3, he alleged a violation of the Double Jeopardy Clause and issue  
20 preclusion/collateral estoppel based upon West's conviction in Case No. CR 6429, and ineffective  
21 assistance of appellate counsel.

22 In May 2015, the state district court entered an order dismissing West's entire petition on  
23 procedural grounds. West appealed. On November 19, 2015, the Nevada Court of Appeals affirmed  
24 the lower court's result, but found the state district court erred in rejecting West's ineffective  
25  
26

1 assistance of appellate counsel claims on procedural grounds. The court addressed those claims on  
2 the merits and denied them.

3 On or about December 18, 2015, West mailed to this court his federal habeas petition  
4 containing three grounds. That petition was filed herein on January 15, 2016, and is the subject of  
5 respondents' motion to dismiss.

6 II. *Cognizability*

7 Respondents assert that grounds for relief contained in Grounds 1, 2, and 3 of West's petition  
8 are not cognizable in a federal habeas proceeding.

9 First, respondents argue that West's guilty plea serves as a bar to several of his substantive  
10 allegations. In *Tollett v. Henderson*, the United States Supreme Court held that "when a criminal  
11 defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is  
12 charged, he may not thereafter raise independent claims relating to the deprivation of constitutional  
13 rights that occurred prior to the entry of the guilty plea." 411 U.S. 258, 267 (1973). A petitioner  
14 may only attack the voluntary and intelligent nature of the guilty plea. *Id.*

15 In Ground 1, West raises a claim that delays in the prosecution of his case violated his  
16 constitutional right to a speedy trial. This claim is barred under *Tollett*. See *United States v. Bohn*,  
17 956 F.2d 208, 209 (9<sup>th</sup> Cir. 1992) (holding that defendant's guilty plea waived claims for violation of  
18 the Speedy Trial Act). In addition, his plea forecloses any claim that his trial counsel was ineffective  
19 for not invoking his right to a speedy trial. See *Moran v. Godinez*, 57 F.3d 690, 700 (9<sup>th</sup> Cir.1994)  
20 (holding that guilty plea forecloses claims of ineffective assistance of counsel unrelated to the plea  
21 itself).

22 Ground 1 also includes a claim that West was vindictively prosecuted. *Tollett* does not  
23 necessarily bar such a claim. See *Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974). However, none  
24 of West's allegations come close to stating a cognizable vindictive prosecution claim. See *United*  
25 *States v. Goodwin*, 457 U.S. 368, 372 (1982) (explaining that the constitutional violation based on  
26

1 vindictive prosecution arises from punishing an individual for exercising a protected statutory or  
2 constitutional right). Thus, that portion of Ground 1 shall also be dismissed. *See O'Bremski v.*  
3 *Maass*, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (reiterating that a habeas petition must contain  
4 particularized facts that point to a real possibility of constitutional error).

5 In Ground 2, West argues that there was a lack of sufficient evidence to prove his guilt  
6 beyond a reasonable doubt. This claim is also barred by *Tollett*, given that the very nature of a guilty  
7 plea is an admission that the State possesses such evidence. *Tollett* does not, however, bar West's  
8 claim in Ground 3 that his conviction violated his rights under the Double Jeopardy Clause. *See*  
9 *Menna v. New York*, 432 U.S. 61, 62 (1975).

10 Next, respondents argue that the portions of Grounds 1, 2, and 3 that allege violations of state  
11 law must also be dismissed. It appears to this court that only Grounds 1 and 2 contain specific claims of  
12 state law violations. In any case, it goes without saying that 28 U.S.C. § 2254 does not provide a  
13 remedy for alleged violations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("In  
14 conducting habeas review, a federal court is limited to deciding whether a conviction violated the  
15 Constitution, laws, or treaties of the United States."). Thus, West's claims are dismissed to the  
16 extent they are not premised on federal law.

### 17 III. *Procedural default*

18 A federal court will not review a claim for habeas corpus relief if the decision of the state  
19 court denying the claim rested on a state law ground that is independent of the federal question and  
20 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The Court  
21 in *Coleman* stated the effect of a procedural default as follows:

22 In all cases in which a state prisoner has defaulted his federal claims in  
23 state court pursuant to an independent and adequate state procedural  
24 rule, federal habeas review of the claims is barred unless the prisoner  
25 can demonstrate cause for the default and actual prejudice as a result of  
26 the alleged violation of federal law, or demonstrate that failure to  
consider the claims will result in a fundamental miscarriage of justice.

1 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

2 A state procedural bar is "independent" if the state court explicitly invokes the procedural  
3 rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9<sup>th</sup> Cir. 1995).  
4 A state court's decision is not "independent" if the application of a state's default rule depends on a  
5 consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9<sup>th</sup> Cir. 2000). Also, if the  
6 state court's decision fails "to specify which claims were barred for which reasons," the Ninth Circuit  
7 has held that the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio*  
8 *v. Crawford*, 306 F.3d 742, 775 (9<sup>th</sup> Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9<sup>th</sup> Cir.  
9 2003).

10 A state procedural rule is "adequate" if it is "clear, consistently applied, and well-established  
11 at the time of the petitioner's purported default." *Calderon v. United States Dist. Court (Bean)*, 96  
12 F.3d 1126, 1129 (9<sup>th</sup> Cir. 1996) (citation and internal quotation marks omitted). In *Bennett v.*  
13 *Mueller*, 322 F.3d 573, 585-86 (9<sup>th</sup> Cir. 2003), the court of appeals announced a burden-shifting test  
14 for analyzing adequacy. Under *Bennett*, the State carries the initial burden of adequately pleading  
15 "the existence of an independent and adequate state procedural ground as an affirmative defense."  
16 *Id.* at 586. The burden then shifts to the petitioner "to place that defense in issue," which the  
17 petitioner may do "by asserting specific factual allegations that demonstrate the inadequacy of the  
18 state procedure, including citation to authority demonstrating inconsistent application of the rule."  
19 *Id.* Assuming the petitioner has met his burden, "the ultimate burden" of proving the adequacy of  
20 the state bar rests with the State, which must demonstrate "that the state procedural rule has been  
21 regularly and consistently applied in habeas actions." *Id.*

22 Respondents argue that Grounds 1 and 2 are procedurally defaulted because the Nevada  
23 Court of Appeals dismissed those claims under Nev. Rev. Stat. § 34.810(1)(a), which, with respect to  
24 collateral challenges to convictions based on guilty pleas, requires the dismissal of any claim that is  
25 not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea  
26

1 was entered without effective assistance of counsel. In addition, respondents argue West's  
2 ineffective assistance of appellate counsel claims premised on counsel's failure to raise the  
3 substantive issues presented in Grounds 1 and 2 are also procedurally defaulted because the Nevada  
4 Court of Appeals dismissed those claim due to West's failure to preserve the underlying issues for  
5 appellate review. Lastly, respondents argue that the portion of Ground 3 alleging an issue preclusion  
6 theory is procedurally defaulted because the Nevada Court of Appeals dismissed that claim due to  
7 West's failure to include it with his Double Jeopardy Clause argument in his pre-trial motion to  
8 dismiss.

9 In opposing respondents' motion to dismiss, West has not met his burden of placing Nev.  
10 Rev. Stat. § 34.810(1)(a) in issue as required by *Bennett*. Thus, this court must conclude that the  
11 Nevada appellate court's reliance on that rule is adequate to bar federal review. The claims  
12 contained in Grounds 1 and 2 – the speedy trial claim, the vindictive prosecution claim, and the  
13 sufficiency evidence claim – are all procedurally defaulted. Moreover, West has not established that  
14 the defaults should be excused under a cause and prejudice or a fundamental miscarriage of justice  
15 theory.

16 With respect to the ineffective assistance of appellate counsel claims, this court does not  
17 agree that the Nevada Court of Appeals disposed of those claims on procedural grounds. Instead, the  
18 state court clearly addressed them on the merits. ECF No. 14-24, p. 4-5. Thus, while it is difficult to  
19 discern how counsel could have been ineffective for not raising issues not preserved for appeal,  
20 West's appellate IAC claims are not procedurally defaulted. As for the issue preclusion claim, the  
21 Nevada Court of Appeals addressed that claim within the context of disposing of West's appellate  
22 IAC claim, not as a stand alone claim. *Id.* So that claim is not procedurally defaulted either.

23 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 12) is  
24 GRANTED in part and DENIED in part. For the reasons discussed above, all of the claims in  
25  
26

1 Grounds 1 and 2 of West's petition for writ of habeas corpus (ECF No. 9) are dismissed except for  
2 claims premised on ineffective assistance of appellate counsel.

3 **IT IS FURTHER ORDERED** that the respondents shall have **forty-five (45) days** from the  
4 date on which this order is entered to answer the remaining claims in the petition. To the extent they  
5 have not done so already, respondents shall comply with Rule 5 of the Rules Governing Section  
6 2254 Cases in the United States District Courts. Petitioner shall have **forty-five (45) days** from the  
7 date on which the answer is served to file a reply.

8 **IT IS FURTHER ORDERED** that respondents' motion to strike (ECF No. 19) is DENIED.

9 Dated this 1 day of <sup>March</sup> [REDACTED], 2017.

10  
11   
12 \_\_\_\_\_  
13 UNITED STATES DISTRICT JUDGE  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26